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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-696

NORA LEWIS, et al.,

Petitioners,

—v.—

PHILIP MORRIS, INC., et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Petitioners Nora Lewis, et al., submit this Reply Brief in support of their Petition for Writ of Certiorari.

(1) *Effect of An Interlocutory Appeal on the Jurisdiction of a District Court.*

The Petition details at length the complex array of conflicting standards that have been adopted by the courts of appeals as to the effect of an interlocutory appeal on the continued jurisdiction of a district court. The respondent company suggests that any such conflict is of no consequence because the actions of the district courts in those cases either were authorized by Rule 62(c), maintained the status quo, or continued "with aspects of the action which did not impinge upon the jurisdiction of the appellate court." Brief for Respondent Philip Morris, pp. 8-9. This description, however, merely papers over the conflict, for the disagreement among the courts of appeals

is over what lower court action if any would improperly "impinge upon the jurisdiction of the appellate court."

The company describes the action of the district court here as an improper attempt to "impair the jurisdiction of the appellate court." *Id.*, p. 8; see also Respondent Unions' Brief, p. 4. Such a conclusory characterization throws little light on the problem posed by appeals under 28 U.S.C. § 1292(a). This is not a situation in which a district court sought to snatch a case from the Fourth Circuit on the eve of an appellate decision. The district court had vacated the disputed Guidelines some 18 months before the court of appeals ruled on their correctness. The proceedings below may more fairly be described as an attempt by the respondents to attack the jurisdiction of the district court to grant their own motions for reconsideration of the Guidelines in order to precipitate premature appellate consideration.

Both respondents urge that the decision of the court of appeals to pass on the correctness of the already vacated district court order was providential, since it led to a modification of the district court's finding of liability without a need for extensive district court proceedings to frame detailed relief. Brief for Respondent Philip Morris, pp. 12-13; Respondent Unions' Brief, p. 4. Interlocutory review of any district court orders, including vacated orders, might serve a similar purpose in any one case, but Congress has decided that in general that advantage must be foregone in favor of a policy of deferring appellate review until the final and complete disposition of a case by the trial court. The narrow exception created by section 1292(a) to that policy against piecemeal appeals was intended only to "permit litigants to effectually challenge orders of serious, perhaps irreparable, consequence," *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181

(1955); an order which a district court wishes to vacate, rather than enforce, cannot conceivably be described as threatening "serious, perhaps irreparable, consequence[s]." In this case, moreover, completion of the district court proceedings might well have resulted in additional evidence or findings of relevance to the question of liability. See *Gardner* v. *Westinghouse Broadcasting Co.*, 57 L.Ed. 2d 364, 368 (1978). Although section 1292(a) authorizes appeals from certain interlocutory orders, it "would twist the fabric of the statute more than it will bear" to construe it to authorize appellate review of an injunctive order a year and a half after the district court has granted a motion to vacate that very injunction. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 746 (1976).

(2) *Compliance With the Standards of* Furnco Construction Corp. v. Waters.

The second question presented by the Petition concerns the failure of the court of appeals to resolve the merits of this case in a manner consistent with the standards required by *Furnco Construction Corp.* v. *Waters*, 57 L.Ed. 2d 957 (1978). Neither respondent contends that the *Furnco* standards were adhered to by the Sixth Circuit.

Respondents suggest, rather, that the *Furnco* standards were inapplicable, or that the Sixth Circuit's failure to apply them was harmless, because the district court found no intentional discrimination. Brief for Respondent Philip Morris, pp. 15-16; Respondent Unions' Brief in Opposition, pp. 5-6. But in *Furnco* itself the district court had also refused to find intentional discrimination, and the *Furnco* standards clearly apply in such a case. 57 L.Ed.2d at 964. The finding of the district court in this case is, like the opinion of the court of appeals, inconsistent with *Furnco*. The district court expressly found a *prima facie* case of intentional discrimination, App. 20a, rejected as contra-

dicted by the record all the non-discriminatory reasons advanced by counsel for respondents for assigning most black applicants to the lowest paid jobs, App. 27a-30a, and yet asserted without explanation that it was "unable to find" purposeful discrimination. App. 32a. Both *Furnco* and *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973), mandated a finding of intentional discrimination under those circumstances.

Because the Sixth Circuit, like the district court, "imposed a heavier burden on the employ[ee] than *Furnco* warrants," its judgment should be vacated and the case remanded for reconsideration in light of *Furnco*. *Board of Trustees of Keene State College* v. *Sweeney*, 47 U.S.L.W. 3330, 3331 (1978).

Respectfully submitted,

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